

November 21, 2011

Via Electronic Mail (rule-comments@sec.gov)

U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-1090
Attention: Elizabeth M. Murphy, Secretary

COMMENT LETTER AND PETITION FOR DISAPPROVAL

Re: Notice of Filing and Immediate Effectiveness of Proposed Rule Change Offering a Market Data Product to Vendors and Subscribers that Combines Three Existing Market Data Feeds as well as Additional Market Data from the Exchange Into One Integrated Product, the NYSE Arca Integrated Data Feed, File No. SR-NYSEArca-2011-78, Exchange Act Release No. 65669 (Nov. 2, 2011) (“Notice”)

Dear Ms. Murphy:

SIFMA¹ and NetCoalition² appreciate the opportunity to comment on the above-captioned Notice, under which NYSE Arca, Inc. (“Exchange”) proposed a rule change offering a market data product to vendors and subscribers that combines three existing market data feeds as well as additional market data from the exchange into one integrated product, the NYSE Arca Integrated Data Feed (combining NYSE Arca BBO, NYSE Trades, and NYSE ArcaBook).³

¹ The Securities Industry and Financial Markets Association (SIFMA) brings together the shared interests of hundreds of securities firms, banks and asset managers. SIFMA's mission is to develop policies and practices which strengthen financial markets and which encourage capital availability, job creation and economic growth while building trust and confidence in the financial industry. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association (GFMA).

² NetCoalition is the public policy voice for some of the world's most innovative companies on the Internet. NetCoalition represents the interests of Internet and technology companies, including Amazon.com, eBay, Google, Bloomberg L.P., IAC/Interactive, and Yahoo!.

³ *Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Offering a Market Data Product to Vendors and Subscribers that Combines Three Existing Market Data*

The proposed rule change is purported to become effective upon filing with the U.S. Securities and Exchange Commission. As explained below, the Exchange has failed to meet its burden of showing that the rule promotes just and equitable principles of trade, removes impediments to and perfects the mechanism of a free and open market and a national market system, protects investors and the public interest, and is not designed to permit unfair discrimination among customers, brokers, or dealers as required under Section 6(b) of the Securities Exchange Act of 1934 (“Exchange Act”). As an exclusive processor of its own data, the Exchange also failed to consider the necessary standard for approval under Section 11A of the Exchange Act. The Exchange did not provide any substantial evidence to support its assertion that the proposed rule change could properly become effective on the basis that it does not: (i) significantly affect the protection of investors or the public interest; or (ii) impose any significant burden on competition. As discussed below, the Commission should conclude that neither assertion is correct and that the Exchange’s reliance on Exchange Act Section 19(b)(3)(A) and Rule 19b–4(f)(6)(iii) thereunder is misplaced and the rule cannot lawfully have taken effect.

The Notice simply reiterated the Exchange’s platform theory of market data (that competition among exchanges for listings and order flow results in competition in the packaging, distribution and selling of market data) in concluding that the proposed rule will not impose any burden on competition that is not necessary or appropriate in furtherance of the Exchange Act. The United States Court of Appeals for the District of Columbia Circuit rejected that theory in *NetCoalition v. Securities and Exchange Commission*,⁴ thus making it impermissible for either NYSE Arca or the Commission to rely on this theory. Both the Exchange and the Commission must consider whether certain vendors and subscribers will be competitively advantaged or disadvantaged by the exchange making its package of bundled data available through two different networks, one of which is faster than the other.

A. The Integrated Data Feed May Further Disadvantage Certain Investors Who Must Rely on the “Core” Data Distributed through the Consolidated Tapes

The Exchange states that the Integrated Data Feed will provide a “lower latency solution to those vendors and subscribers that are interested in receiving market data as quickly as possible.” The Exchange does not explain which vendors and subscribers it is referring to, why faster data is important to them, and on what basis the Exchange believes there are investors who are satisfied with slow data. Faster data may advantage certain investors over others. Vendors and subscribers who can afford the Integrated Data will want it because it gives them a trading advantage over those who do not purchase it. Those investors who cannot afford or access the Integrated Data and only have access to the slower consolidated data feeds may be disadvantaged. We believe accordingly that the Exchange’s contention that there is a “choice” among market data products is false. Since the vast majority of investors cannot access better data, the Exchange’s rule does not “promote a free and open market” as the Exchange asserts. As such, important issues of market structure fairness

Feeds as well as Additional Market Data from the Exchange Into One Integrated Product, the NYSE Arca Integrated Data Feed, Exchange Act Release No. 65669; File No. SR-NYSEArca-2011-78; 77 Fed. Reg. 69311 (Nov. 8, 2011).

⁴ 2010 U.S. App. LEXIS 16303 (D.C. Cir. Aug. 6, 2010).

must also be considered under Section 6(b) of the Exchange Act. The Exchange's failure to do so requires the Commission to temporarily suspend the proposed rule and commence proceedings to consider disapproval of the Exchange's rule.

B. The Exchange Failed to Provide any Information about the Potential Impacts on Competition or Investors of Offering the Same Data on Two Different Networks

The Exchange proposes to offer the Integrated Data Feed through two networks, to two different groups of subscribers, at two different speeds. The first is the "Liquidity Center Network" or LCN, which is a local area network in its own New Jersey data center "that is available to Users of the Exchange's co-location services." The second is through the Exchange's standard network for everyone else. There is no information, data, or analysis about the potential impacts on competition, on the national market system, or on institutional or retail investors of offering the same data through two networks, one faster and one slower. As a result, we do not know whether this will advantage one group of subscribers over another, or whether and how it will affect trading and quoting behavior. The Commission should consider the market fairness issues potentially triggered by this product. Because the rule filing does not include sufficient information for the Commission to consider these questions, the Commission should temporarily suspend the proposed rule.

C. The Exchange's Unsubstantiated Recitation of "Alternatives" to the Integrated Data is Contrary to the D.C. Circuit's decision in *NetCoalition*

The Exchange "notes that the existence of alternatives to the Exchange's product, including real-time consolidated data, free delayed consolidated data, and proprietary data from other sources . . . ensure that the exchange is not unreasonably discriminatory because vendors and subscribers can elect these alternatives." The Exchange fails to support its conclusion with any evidence. Under the Court's holding in *NetCoalition*, a market data provider must evaluate the number of potential users of its data and assess how those users might react to changes in how the data will be distributed. As the Court found in *NetCoalition*, only the Exchange is able to offer its Integrated Data Feed and there is no substitute.

D. The Exchange's Failure Concurrently to Propose the Price for the Integrated Data and Provide Notice of the Additional Data that it may Integrate in the Future Renders the Rule Filing Incomplete and Prevents the Commission from Performing its Review Obligation under the Exchange Act

Whether a market data product meets the requirements for approval under the Exchange Act depends on the method and manner of distribution and its price. The Notice, however, is silent about price, one of the key elements of the Commission's required analysis. By disaggregating price from the other aspects of the rule, the Exchange has impeded, if not prevented, members of the public from evaluating and commenting on the rule's ultimate impact, and the Commission is unable to undertake the comprehensive review mandated by the Exchange Act.

The Exchange is requesting approval of its new Integrated Data Feed, including other "types" of market data such as order imbalance information and security status information. This is too vague and does not meet the requirements of Exchange Act Section 19(b) which

requires the Exchange to state with particularity its proposal so that interested and potentially affected members of the public can comment to the Commission, and so that the Commission can consider those comments in deciding what action to take.

Finally, it is contrary to the Court's decision in *NetCoalition v. SEC* for the Exchange to propose and the Commission to approve a new use and distribution of the NYSE ArcaBook data without first providing substantial evidence that the fees for that data (as they will be incorporated into the Integrated Data Feed) meet the Exchange Act's requirement that they be fair and reasonable. This proposal should be set aside until the D.C. Circuit renders a final opinion in the follow-up *NetCoalition* matter pending before that court.

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If you have any questions or you would like to discuss these matters further, please call Melissa MacGregor, Managing Director and Associate General Counsel at SIFMA at 202-962-7385.

Respectfully submitted,

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